Filed 3/26/19 Marriage of Bal CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| In re the Marriage of DAVID and JUDITH BAL. | |
| DAVID BAL,<br><br>Appellant,<br><br>v.<br><br>JUDITH BAL,<br><br>Respondent. | F075395<br><br>(Super. Ct. No. R-1502-FL-8374)<br><br>**OPINION** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kern County. Donald P. Glennon, Jr., Commissioner.

David Bal, in pro. per., for Appellant.

No appearance for Respondent.

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In this marriage dissolution proceeding, appellant challenges (1) the assignment of a debt solely to him, (2) the valuation of a home business allocated to him, (3) the

[*] Before Peña, Acting P.J., Smith, J. and Snauffer, J.

determination for purposes of child support that his earning capacity was $4,000 per month, and (4) an order directing him to pay attorney fees in the sum of $7,103.50.

First, based on case law not cited by appellant, we conclude the trial court did not err in considering his fault when it assigned him the debt for overpaid wages arising from his falsification of timecards. Second, we conclude the trial court was not required to accept appellant's statement of the liquidation value of the home business as the appropriate value. Third, the trial court did not err in determining appellant was capable of working a 40-hour week at near minimum wage and earning additional income from the home business. The record shows that prior to the separation, appellant worked a full-time job earning $7,250 per month and, during that period, operated the home business. Fourth, the trial court made the statutorily required findings before awarding attorney fees and appellant has not carried his burden of affirmatively demonstrating those findings were not supported by substantial evidence.

We therefore affirm the judgment.

## FACTS

Appellant David Bal and respondent Judith Bal were married in June 1999. Their three sons were born in 2001, 2004, and 2006. David filed a petition for dissolution of marriage in 2014. The court determined the date of separation was July 5, 2015—the date Judith was served with the petition for dissolution. In July 2016, David moved from the family residence and established a second home.

David has a master's degree in engineering and, prior to separation, was earning an annual salary of $87,000. Judith has a bachelor's degree and a teaching certificate. A few years before separation, she obtained temporary employment with the local school district, which became full time in 2015. In the fall of 2016, her gross pay was approximately $4,140 per month.

In 2015, after 14 years of employment at the Naval Weapons Center in Ridgecrest, David was discharged for not coming to work on time and falsifying his timecard. David

asserted this behavior was the result of depression caused by his failing marriage. Due to the overpayment of his wages, David was directed to repay $15,000 to the Navy.

During their marriage, the parties created a private business, which they operated from their home and referred to as "DJ Magic Cards." The business sells trading cards on eBay. David valued the business at $13,500, which he described as "the liquidation value I was offered for bulk cards (4.5 million cards x 0.003 = $13,500)." Subsequently, in his motion for new trial, David stated the valuation was "based on the liquidation value of the business I was offered by a vendor in the same field."

After David lost his job, the home business was his sole source of income. After moving from the family home in July 2016, David paid his expenses with money earned from the home business. He states the business takes about 24 hours per week, has become tedious, and he looks forward to when he can stop and replace it with a more lucrative and fulfilling enterprise, such as a software business he is trying to create. David has not referred to any evidence about the amount of time he actually devotes per week or month to creating a new business.

**PROCEEDINGS**

The trial was held on June 23, 2016, and November 3 and 15, 2016. On December 13, 2016, the trial court issued a written ruling relating to (1) the date of separation, (2) dividing assets and debts, (3) determining the community property interest in real and personal property, (4) child support, custody and visitation, and (5) attorney fees.

In the ruling, the trial court imputed earnings of $5,000 per month to David and ordered him to pay child support of $1,239 per month. The court assigned the trading card business to David as his separate property, valued it at $30,000, and directed him to pay half of that value to Judith. The court determined the $15,000 debt owed to the Navy due to the overpayment of wages was solely David's responsibility, without division or offset against Judith, and found David created the debt by his misfeasance. The ruling

addressed Judith's request for attorney fees and costs totaling $8,903.50 and directed David to pay the sum of $7,103.50 as attorney fees.

On December 20, 2016, David filed a request for order changing the amount of child support and some of the other determinations made in the December 13, 2016, ruling. Judith responded to the request by arguing the existing order should remain in effect.

On February 1, 2017, David filed a motion for new trial asserting irregularities in the proceedings, newly discovered evidence, a new financial situation, and other issues. Judith filed a response objecting to a new trial because there were no new facts. Her points and authorities presented arguments on the issues of David's imputed income, the assignment of the debt owed to the Navy, valuation of the home business, and attorney fees.

On February 10, 2017, the trial court filed findings and order after hearing relating to a hearing held on December 14, 2016. As to child support, the court stated David was not sick or disabled, was willing to work, and was looking for work, but should have done more to find a job after the date of separation. The court imputed earnings of $4,000 per month to David based on a minimum wage job earning $11.00 per hour on top of the income from the home business. Based on this determination of David's earning capacity, the court directed him to pay child support of $959 per month.

On March 7, 2017, the trial court filed a judgment of dissolution. David filed a timely appeal.

## DISCUSSION

### I. INADEQUACY OF APPELLATE RECORD

The record of the evidence submitted to the trial court is sparse. There is no record of the oral testimony presented. David requested a reporter's transcript of the last day of trial, November 15, 2016, but not of the other days, June 23, 2016, and

November 3, 2016. The minute order for the requested day indicates no court reporter was present. The superior court clerk's affidavit states that, pursuant to Government Code section 69957, a transcript of the electronic recording of the November 15, 2016, proceeding is not available. The alternative to a reporter's transcript is an agreed or settled statement of the proceedings. (See Cal. Rules of Court, rules 8.120(b), 8.130(h).) No agreed or settled statement was filed with this court.

In an appeal, the appellate court is constitutionally required to presume the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To overcome this presumption, an appellant challenging a judgment must affirmatively demonstrate prejudicial error. (*Ibid*.) When an appellant contends a trial court's findings of facts are wrong, the appellant must demonstrate the record does not contain substantial evidence to support that finding of fact. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658.) To demonstrate the absence of substantial evidence, the appellant must provide the appellate court with an adequate record of the evidence (including oral testimony) presented in the trial court. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [absence of a reporter's transcript or settled statement meant plaintiff failed to provide an adequate record and, thus, failed to carry the burden of showing prejudicial error].) In *Estate of Fain* (1999) 75 Cal.App.4th 973, the Second District stated:

> "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Id*. at p. 992; see *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-187 [list of cases where absence of reporter's transcript precluded appellate court from reaching merits].)

Here, many of the claims of error raised by David challenge express or implied findings of fact. Without a reporter's transcript or settled statement, it is not possible for this court to determine whether the evidence was sufficient to support the challenged findings. (*Jameson v. Desta*, *supra*, 5 Cal.5th at p. 608 [lack of a reporter's transcript "will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court"].) Consequently, to the extent David's appeal is based on claims of factual error, those claims must be rejected because the record is inadequate to demonstrate the lack of substantial evidence as to those findings.

## II. DEBT TO EMPLOYER FOR OVERPAYMENT OF WAGES

### A. Background

#### *1. Trial Court's Decision*

The trial court's written ruling dated December 13, 2016, included the following findings:

> "[David] had been employed at the Naval Weapons Center for 14 years, earning $87,000.00 per year. He was officially terminated in 2015 after an investigation that he was not coming to work on time and had falsified his time card. [David] testified that his failure to attend work and falsify his timecard was a result of depression caused by his failing marriage. He did not seek medical help with his depression. [Judith] was not aware or participated in [David's] malfeasance. [¶] [David] has appealed the firing, but lost. He currently has been ordered to repay the unemployment money in the amount of $15,000.00."

In dividing the parties' debts, the court awarded the "DEFAS Navy debt of at least $15,000.00 solely to [David] without division or offset against [Judith]." The reason stated was that David's malfeasance created the debt.

#### *2. Claim of Error*

David contends the trial court incorrectly interpreted the law when it assigned the debt solely to him. He contends this error is subject to de novo review. He cites Family

Code section 910[1] for the principle that the community is liable for all debts incurred during the marriage and contends the debt is a community liability because it was incurred before the date of separation.

David also argues the "court erred in determining the debt 'was created by his malfeasance.' " In David's view of cause and effect, he missed work due to depression, the depression was caused by the unhappy home environment, Judith contributed to that environment, and, therefore, Judith contributed to the creation of the debt.

Without reference to any authority, David contends his being at fault was irrelevant. He contends if he had recorded his time correctly, the community would not have received the overpayment of wages. Because the community received the overpayment, David contends the community also should share in the repayment of the debt.

B. Applicable Statutes

*1. Section 910*

Section 910 is the only authority David cited to support his argument. Subdivision (a) of section 910 provides in full:

> "*Except as otherwise expressly provided by statute*, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." (Italics added.)

We have italicized the lead-in clause because it demonstrates the Legislature's intent that the general rule contained in section 910 be subject to exceptions stated elsewhere. The flaw or gap in David's legal argument is that it does not mention other statutory provisions and address how those provisions apply in this case.

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[1] All unlabeled statutory references are to the Family Code.

*2. Provisions for Dividing Debt*

Section 2550 sets forth the general rule for the division of the community estate (which includes both assets and liabilities) in a dissolution proceeding. This question of dividing assets and liabilities between the spouses is different from the question of the *liability* of the community estate to third parties, which is addressed in sections 910 and 1000.[2] Section 2550 states:

> "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, *or as otherwise provided in this division*, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally." (Italics added.)

Section 2550, like section 910, sets forth a general rule that is subject to exceptions stated elsewhere in the Family Code. Our search for exceptions begins with section 2551, which states: "For the purposes of division and in confirming or *assigning the liabilities* of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with Part 6 (commencing with Section 2620)." (Italics added.) This statutory text requires trial courts to decide whether liabilities covered by section 910 should be characterized as separate or community and to make that determination in accordance with sections 2620 through 2628.

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[2] A creditor's ability to collect from the community does not depend on the classification of the debt as community or separate; however, the sequence in which a creditor may seize property to satisfy the debt may depend on the classification. (Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?* (2007) 47 Santa Clara L.Rev. 1, 14, fn. 63.) Section 1000 is a "so-called 'marshalling' statute[]," that requires a creditor holding certain types of debt to look first to the separate property of the married person whose act or omission gave rise to the liability before resorting to the community estate. (*Ibid.*; § 1000, subd. (b)(2).)

Section 2620 states: "The debts for which the community estate is liable which are unpaid at the time of trial, or for which the community estate becomes liable after trial, shall be confirmed or divided as provided in this part." Section 2621 addresses premarital debts and is not relevant to this appeal. Section 2622 addresses marital debts incurred before the date of separation. Although it is unclear from the record the exact date or dates when the debt to the Navy was "incurred," we will assume for purposes of analysis that it was incurred before July 5, 2015, the date of separation. (See §§ 902 [debt], 903 [when debt is incurred].) Generally, "debts incurred by either spouse after the date of marriage but before the date of separation shall be divided as set forth in Sections 2550 to 2552, inclusive, and Sections 2601 to 2604, inclusive." (§ 2622, subd. (a).) This principle is subject to section 2625, which states:

> "Notwithstanding Sections 2620 to 2624, inclusive, all *separate debts*, including those debts incurred by a spouse during marriage and before separation that were *not incurred for the benefit of the community*, shall be confirmed without offset to the spouse who incurred the debt." (Italics added.)

One practice guide interprets section 2625 to mean that "once the court characterizes an unpaid liability as a 'separate debt' (Fam. C. § 2551), the debt does *not* factor into the equal division of the community estate." (2 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2018) § 8:1288, p. 8-459 (*Hogoboom*).) Another states: "[Section] 2625 requires the court to assign all separate debts to the spouse who incurred the debts, without offset. For the sole purpose of post-dissolution debt allocations, the statute introduces into California law the notion of a separate contract debt. Under the older law, separate indebtedness was limited to tort liability." (Bassett, Cal. Community Property Law (2018 ed.) § 10:61 [§§ 2620 and 2625 regulate only the rights of the parties between themselves and do not affect creditors' rights].)

Here, David's claim the trial court committed legal error is, in effect, a claim that the court misapplied section 2625.

C. Analysis

*1. Relevance of Fault*

The Family Code does not define the term "separate debt" or the phrase "not incurred for the benefit of the community." (See § 2625; *Hogoboom, supra*, § 8:765, p. 8-278.) Contrary to David's argument that his fault is irrelevant, some courts look at the nature of the tortious conduct in determining whether an activity that gave rise to the liability was for "the benefit of the community." (§ 2625; cf. § 1000, subd. (b)(1) [liability for tort while "married person was performing an activity for the benefit of the community]".) "Several cases focus on the nature of the tortfeasor's conduct: *Intentional* or *criminal* misconduct and, perhaps, even gross negligence may be enough to characterize the liability as *not* arising out of the performance of an activity for the benefit of the community." (*Hogoboom, supra*, § 8:766, p. 8-278; see *In re Marriage of Stitt* (1983) 147 Cal.App.3d 579, 587-588.) Accordingly, we reject David's legal argument that his fault is irrelevant under the California statutes that govern the assignment of debt in a marriage dissolution proceeding. He has cited no legal authority to support his argument and, therefore, has not demonstrated the trial court erred when it relied on his intentional misconduct—specifically, his falsification of timecards—when it assigned the Navy debt to him.

*2. Causation*

Besides his legal argument that fault is irrelevant, David also challenges the trial court's finding that the debt was created by his malfeasance. In his view of causation, Judith contributed to the creation of the debt by contributing to the unhappy home environment that caused his depression, which in turn, caused him to miss work. His argument implies her conduct was a cause of his decisions to falsify his timecards.

Ordinarily, causation presents a question of fact to be decided by the trier of fact. (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.) In some instances, however, the undisputed evidence may allow the issue of causation to be decided as a matter of law—that is, the appellate court may properly decide no rational trier of fact could decide the question contrary to the appellant's arguments. (*Id*. at pp. 871-872.)

" ' "An act is a cause in fact if it is a necessary antecedent of an event." ' " (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 352.) Here, the evidence referred to by David is not so strong that a rational trier of fact could only decide Judith's conduct was a necessary antecedent of both David's missing work and his affirmative act of falsifying timecards. Consequently, the issue of causation raised by David cannot be decided as a matter of law and, as a result, we must review the trial court's finding of fact under the substantial evidence standard.

> "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that … the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; see *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 20-21 (*Montebello Rose*).)

Under this deferential standard of review, appellate courts do not reweigh the evidence. Here, conflicting inferences could be drawn from the evidence. Accordingly, we must accept the trial court's finding that David's malfeasance caused the debt and the implied finding that Judith's conduct did not partially cause the debt.

## III. VALUATION OF HOME BUSINESS

### A. Background

#### *1. Trial Court's Decision*

The trial court's written ruling dated December 13, 2016, included the following findings:

> "[David] and [Judith] created a private business, "Magic Cards," during the marriage. He is currently solely operating the business and is keeping all the profits of the business. [David] testified that this is, not now, a 'viable business' as he must have a physical site to operate under the new requirements imposed by the manufacture and licensing company. [¶] At trial [Judith] testified that [there] are ways to advance the business without a physical structure. [David] appeared not to be interested in advancing the business; rather he wanted to work off the dwindling assets. [¶] The business grossed $90,000 in 2013, $51,000 in 2014, [and $30,000 in 2015]. At trial [David] valued the business at $30,000.00."

The court awarded David "the Magic Card Business as his sole and separate property" and valued the business at $30,000.

#### *2. David's Contentions*

David contends the trial court erred in finding the home business had a value of $30,000 because "there is no substantial evidence to support that finding." David contends he valued the business at $13,500 based on a liquidation value and Judith provided no value. He suggests that the court "either misheard or incorrectly transcribed the value of the home business as provided by [him]." In David's view: "The business must be valued by the only valuation provided to the court — $13,500."

#### *3. Judith's Arguments*

Judith did not file a respondent's brief. However, papers she filed in the trial court addressed the valuation of the business. Her points and authorities dated January 10, 2017, in support of a response to David's request for order stated:

> "The Court found that the business was worth only $30,000. [David] has not provided a current Profit and Loss or an accounting as to what inventory was available on the day of Trial. Nevertheless, he is objecting

> to the Court's valuation after hearing. [¶] During the marriage, the Magic Card Business always had a substantial income and it was only after [we] separated that the business went downhill. Both parties testified in court that they had not comingled their income for some time and that [David] had been in charge of the Magic Card Business.
>
> "By his own testimony, [David] did not choose to continue to do what it took to maintain the income and the viability of the business. The Court is a court of equity and has every right to find that [Judith's] community share was higher than [David] is currently alleging in light of the fact he testified he had made the choice to stop operating the business once he was in control yet did not provide evidence in the form of inventory or Profit and Loss. His testimony was that the business was worth more money but he decided to stop purchasing inventory because he was no longer allowed to purchase from the same vendors without a 'Brick and Mortar' place to sell. There is no evidence that he attempted to find other vendors or that he made much effort to set up his inventory in the local stores in Ridgecrest."

About a month later, Judith filed points and authorities opposing David's motion for new trial, which stated:

> "Evidence was introduced by [David] showing that the home business, in some years, earned as much as $70,000.00 per year. Evidence was introduced by [David] stating the business was worth $30,000.00 when he requested the right to stay in the family home because his cards were located in the family home. After he was awarded the business but told he must move out of the family home, he changed his testimony he had earlier alleged as to the value of the business. The Court reviewed all the taxes and financial statements presented by [David] and made a Finding of Value. There is no showing that there is new evidence, only that [David] disagrees."

B. Analysis

In marriage dissolution proceedings, the valuation of a business is a factual question and appellate courts accept the trial court's factual determination of value so long as it is supported by substantial evidence. (*In re Marriage of Honer* (2015) 236 Cal.App.4th 687, 694.) David's appellate brief has correctly identified the court's determination of value as a "finding" that must be supported by substantial evidence. In

contrast, his argument that the trial court was required to accept his liquidation value of $13,500 is not correct and does not demonstrate the court's finding was wrong.

First, David has cited no authority supporting his argument that the *liquidation* value of the home business is the only appropriate method of valuation. (See generally, *In re Marriage of Bodo* (2011) 198 Cal.App.4th 373, 380-381 [husband described value of company he founded as negligible and estimated its liquidation value was $200,000]; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 665 [accountant's statement that liquidation value of husband's interest in law firm was probably zero was not adopted by trial court].) Thus, David has not shown California law requires the business to be valued at its liquidation value. Consequently, the trial court did not commit legal error by choosing a value other than David's statement of the business's liquidation value.

Second, David has cited no authority that a trier of fact is required to accept one party's opinion about the value of a business when the other party does not offer an explicit opinion about the value. Our independent research has located no such rule of law. Moreover, we will not adopt such a principle because it would contradict the Evidence Code provision addressing the credibility of the testimony offered by a witness. Under Evidence Code section 780, the court may consider any matter that has a tendency in reason to prove or disprove the truthfulness of the testimony. The various matters listed (1) include the existence of an interest or other motive and (2) a statement made by him that is inconsistent with any part of his testimony at the hearing. (Evid. Code, § 780, subds. (f), (h); see *Montebello Rose, supra,* 119 Cal.App.3d at p. 20 [resolving credibility of witnesses is particularly for the trier of fact].) When a trial court expressly or impliedly finds all or part of a witness's testimony is not credible, appellate courts apply the rule that a trier of fact is free to disbelieve a witness, even on uncontradicted evidence, if there is any rational ground for doing so. (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043.)

Based on the rule of appellate procedure that requires this court to view the evidence in the light most favorable to the judgment (i.e., draw all reasonable inferences in favor of the judgment), we are required to infer that the trial court determined David's statement about the liquidation value of the business was not credible. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134 [doctrine of implied findings].) The implied finding that David's valuation of the business at $13,500 was not credible withstands appellate scrutiny because there are rational reasons for disbelieving it. (See Evid. Code, § 780, subds. (f), (h).) Therefore, contrary to David's argument, the trial court was not required to accept his valuation.

Third, David's idea about substantial evidence fails to recognize that *circumstantial* evidence of value can constitute substantial evidence. (See *County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, 73 [circumstantial evidence and the inferences drawn from circumstantial evidence are not necessarily insubstantial].) Here, the trial court explicitly stated the home business grossed $90,000 in 2013, $51,000 in 2014, and $30,000 in 2015. David's November 2016 income and expense declaration stated the income from the home business averaged $2,201.74 per month over the first 10 months of 2016 and described these income figures as more representative than the figures provided on his Schedule C (Profit or Loss From Business) filed as part of his federal income tax return for 2015. Although other inferences about the value of the business could be drawn from these gross revenue and income figures, they provide a sufficient evidentiary basis for inferring the business had a value of $30,000.

Consequently, we conclude David has failed to demonstrate the trial court committed legal error or made findings of fact not supported by substantial evidence when it valued the home business at $30,000.

## IV. CHILD SUPPORT AND IMPUTED INCOME

### A. Basic Principles

#### *1. Statewide Child Support Guideline*

Child support awards in California are governed by the legislation that established a statewide uniform child support guideline. (See §§ 4050-4076.) "The court shall adhere to the statewide uniform guideline and may depart from the guideline only in the special circumstances" identified in the statute. (§ 4052.) An important component of the guideline formula is the "total net monthly disposable income of both parties." (§ 4055, subd. (b)(1)(E).)

Monthly net disposable income usually is computed by dividing the annual net disposable income by 12. The annual net disposable income is computed by finding each parent's annual gross income and deducting the actual amounts attributable to items listed in section 4059. Section 4058 defines the term "annual gross income" as income from whatever source derived, except child support payments actually received and income derived from any need-based, public assistance program. (§ 4058, subds. (a), (c).)

Section 4058 also presents an alternate method of determining a parent's income for purposes of calculating child support. "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children." (§ 4058, subd. (b); see generally, *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1299-1301 [historical overview of earning capacity doctrine that imputes income to a parent].) The statutory term "earning capacity" requires the parent to have both the ability and opportunity to earn income. (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1392.)

*2. Standard of Review*

Child support awards are reviewed for an abuse of discretion. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282 (*Cheriton*).) Consequently, "a child support order premised upon earning capacity rather than actual income will remain undisturbed on appeal absent an abuse of discretion." (*State of Oregon v. Vargas* (1999) 70 Cal.App.4th 1123, 1126.) Under this standard, appellate courts determine whether the trial court's factual findings are supported by substantial evidence and whether the trial court reasonably exercised its discretion—that is, whether any judge reasonably could have made such an order. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 730-731.) The concept of a reasonable exercise of discretion means that trial courts must follow established legal principles. (*Id*. at p. 731.)

B. Trial Court's Decision

The trial court's December 13, 2016, written ruling stated the court imputed earnings of $5,000 a month to David. The court noted David's "proven ability to earn at least $87,000.00 per year" and that David was between jobs by his own choice without recognition of his obligations as a father.

In its February 2017 findings and order, the court modified the amount of David's monthly income. The court imputed earnings of $11.00 per hour for a minimum wage job on top of the "Magic Card" business. Based on these two components, the court determined David's total monthly earning capacity was $4,000. This figure was used as David's monthly wages and salary in the dissomaster report attached to the court's order and resulted in a child support obligation of $959 per month.

The court addressed David's ability to work by finding he appeared healthy and was not sick or disabled. The court also found David should have done more to find a job after the date of separation. These findings and the court's determination of imputed income shows the court found David had the ability to earn income from a 40-hour-per-week job at near minimum wage. It is clear the court did not determine David's earning

capacity based on (1) his salary from 2013 or 2014 or (1) a job comparable to the one he had with the Navy.

C. Imputed Work Week

*1. Contentions*

David contends the trial court erred in determining his imputed income was $4,000 per month because "[t]here is no substantial evidence that there is an opportunity for work in [his] field in the area of Ridgecrest."

Judith's points and authorities opposing David's motion for new trial noted David had an advanced degree and experience in computer technology and had been earning $87,000 a year. She argued: "The fact the Court imputed minimum wage plus his earnings from selling Magic Cards from home, is a benefit to [David], since he testified he quit working, he has not filed for unemployment, and he is electing, according to his current Motion, to work at an occupation that pays nothing now, but may pay in the future. He has no intention of getting any job and he says so."

*2. Analysis*

David's argument that there must be substantial evidence in the record demonstrating an opportunity to work in his field in the Ridgecrest area before income can be imputed to him *at minimum wage* fails to affirmatively demonstrate trial court error. (See *Denham*, *supra*, 2 Cal.3d at p. 564 [appellant must affirmatively demonstrate prejudicial error to overcome presumption that trial court's orders are correct].) David has cited no statute or case law stating that imputing an ability to earn an income *at minimum wage* is dependent upon the availability of job openings in the parent's chosen field. Furthermore, the record he has presented on appeal does not demonstrate there are no job opportunities in the Ridgecrest area that would pay him minimum wage. Therefore, the trial court did not abuse its discretion in determining David's earning capacity included working a 40-hour week at approximately minimum wage.

D. Hours Devoted to Home Business

*1. David's Contentions*

David's second claim of error relating to imputed income asserts he was working 20 to 24 hours per week in the home business at the time of trial and his imputed income should be limited to a 40-hour work week. He argues the proper amount of imputed income is (1) the $2,200 he earns per month from the home business plus (2) the remaining 16 hours per week multiplied by $11 per hour multiplied by 4 weeks per month. David's calculation produced an imputed income of $2,904 per month.

David's arguments do not mention how much time he was devoting to creating a new business, and he has not referred to any evidence showing how much time he is actually working per week. As a result, we cannot discern from the record whether he is limiting his efforts to 40 hours per week.

*2. Analysis*

David relies on *County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393 (*Andrade*) to support his argument that the court will not order a parent to work overtime who has not been. In *Andrade*, the court discussed section 4055's formula for determining the amount of child support based on the net disposable incomes of the parents. (*Andrade*, at pp. 1395-1396.) The court also mentioned the trial court's discretionary authority to " 'consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children.' " (*Id.* at p. 1396, quoting § 4058, subd. (b).) The specific issue presented in *Andrade* was "whether Andrade's past earnings accurately reflect his prospective earnings." (*Andrade*, at p. 1396.) Despite the fact Andrade had earned bonus and overtime pay for the two and one-half years preceding the support hearing, the trial court was unwilling to include those items in calculating his income. (*Ibid.*) The appellate court concluded "it was error for the court to exclude overtime and bonuses in its calculation." (*Id.* at p. 1397.)

It is important to note that *Andrade* did not involve a determination of imputed income—that is, the father's earning capacity for purposes of section 4058, subdivision (b). The appellate court's guidance for remand stated the trial court could disregard past bonus and overtime payment only if it determined Andrade was unlikely to receive them in the future, which might be based on evidence the parent was no longer willing to accept voluntary overtime. (*Andrade*, *supra*, 55 Cal.App.4th at p. 1397.) The court addressed such a change in attitude by stating: "If he voluntarily ceases to work overtime the trial court may then decide, 'in its discretion [whether to] consider [Andrade's overtime] earning capacity' (§ 4058, subd. (b)) pursuant to the criteria set forth in *In re Marriage of Simpson* [(1992)] 4 Cal.4th 225." (*Andrade*, *supra*, at p. 1397.) This statement shows that the overtime earnings are a relevant consideration when determining "earning capacity" under section 4058, subdivision (b). In other words, *Andrade* does not stand for the principle that potential overtime earnings must never be considered in determining imputed income. As a result, David has not demonstrated the trial court exceeded its discretionary authority by considering his ability to work a 40-hour work week and continue to operate the home business.

Next, we consider whether the trial court violated the principles set forth in *In re Marriage of Simpson* (1992) 4 Cal.4th 225 (*Simpson*).[3] In that case, the Supreme Court concluded the trial court's decision to consider the father's earning capacity, as opposed to actual income, in setting child support did not constitute an abuse of discretion. (*Id*. at p. 234.) The court also concluded "earning capacity generally should not be based upon an extraordinary work regimen, but instead upon an objectively reasonable work regimen as it would exist at the time the determination of support is made." (*Id*. at pp. 234-235.)

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[3] David's claim of error involves child support and is distinguishable from *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, which addressed only spousal support and statutory provisions other than section 4058.

Accordingly, the trial court will have complied with *Simpson* if its determination of David's earning capacity was based "upon an objectively reasonable work regimen as it would exist at the time the determination of support [was] made." (*Simpson, supra,* 4 Cal.4th at p. 235.) Determining what is objectively reasonable requires information about the parent's past and present workload. Our evaluation of David's work regimen at the time of the hearings is thwarted by the record presented, which does not show how much time David was devoting to creating a new business. Without that specific information, we infer the trial court acted reasonably in basing David's earning capacity on his prior work regimen. In 2013 and 2014, that work regimen included his full-time job with the Navy and operating the home business in a manner that achieved substantial revenue. This work history provides substantial evidence supporting the finding that an objectively reasonable work regimen for David included 40 hours plus the time spent on the home business. Accordingly, David has not demonstrated the trial court erred in determining his earning capacity was $4,000 per month.

## V. ATTORNEY FEES

### A. Background

#### *1. Trial Court's Decision*

The trial court addressed Judith's request for attorney fees and costs by awarding the sum of $7,103.50 and requiring David to pay the award in monthly installments of $300 delivered directly to Judith's attorney. The court stated it was required to evaluate (1) whether there was a demonstrated disparity between the parties in access to funds to retain or maintain counsel and (2) the ability to pay for legal representation. The court found there was a shown disparity of income and liquid assets and David had the financial ability to pay for the legal representation of both parties. The court also found the attorney fees and costs awarded were reasonable and necessary to the prosecution and defense of the proceeding.

*2. Contentions*

David contends the trial court erred in finding a disparity of income and liquid assets and in finding he had the financial ability to pay for the legal representation of both parties. He contends there is no substantial evidence to support these findings. David argues the court's findings are inconsistent with the facts based on a comparison of his and Judith's actual income, savings, and the value of the cars each took from the community estate. David points to the fact he is representing himself and received a fee waiver from both the superior court and this court by showing financial need.

B. Legal Principles

*1. Statutory Provisions*

Sections 2030 through 2034 govern the award of attorney fees in marriage dissolution proceedings. Sections 2030 and 2032 contain the statutory text applicable to David's claim that the trial court erred in granting Judith's request for attorney fees.

Section 2030, subdivision (a)(2) requires trial courts considering a request for attorney fees to make certain findings. "If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." (§ 2030, subd. (a)(2).) Section 2032, subdivision (b) provides in full:

> "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances."

*2. Standard of Review*

A trial court has considerable latitude in fashioning an award of attorney fees, but its decision must reflect an exercise of discretion and a consideration of the appropriate factors set forth in section 2030 and 2032. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1313.) When assessing one party's relative need and the other party's ability to pay, the court may consider all evidence relating to the parties' current incomes, assets, and abilities, including investment and income-producing properties. (*Id*. at pp. 1313-1314.) Also, the trial court may consider the tactics adopted by the parties during the course of the litigation. (*Id*. at p. 1314; *In re Marriage of Sharples* (2014) 223 Cal.App.4th 160. 165.)

C. Substantial Evidence Review of Findings

David has claimed the trial court's findings underlying its award of attorney fees were not supported by substantial evidence. Well-established principles of appellate practice govern how appellants must present challenges to the sufficiency of the evidence and establish the lack of substantial evidence. In addition to presenting an adequate record on appeal (see pt. I, *ante*), appellants are required to " '*summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient.* [Citation.]' [Citation.] Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived.' " (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; see *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 [appellant "cite[d] only evidence favorable to his position, ignoring all to the contrary. Such briefing is manifestly deficient."]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 [a "party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable"]; *Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 150-151 (*Haynes*).)

Here, David has failed to summarize all the evidence relating to the award of attorney fees. (See *Haynes*, *supra*, 248 Cal.App.2d at p. 151 [appellant is not allowed to evade or shift his responsibility in this manner].) Furthermore, his appellant's appendix does not include Judith's request for attorney fees and the declarations or other evidence Judith may have presented to support her request. (*Ballard, supra,* 41 Cal.3d at p. 574 (*Ballard*) [to demonstrate the absence of substantial evidence, appellant must provide appellate court with an adequate record of the lower court's proceeding].) Judith's January 10, 2017, points and authorities argued David's financial circumstances allowed him to purchase his own home during the dissolution, move in, and set up housekeeping. It also questioned the veracity of his 2015 Schedule C, which showed sales from the home business of $27,000 and the cost of goods as $25,000 despite his testimony that he purchased no new inventory. If an adequate appellate record had been presented, this court could have evaluated these arguments by considering the evidence, and the inferences reasonably drawn from the evidence. Without an adequate record, it is not possible to conduct that evaluation.

When an appellant fails to provide an adequate record—that is, one that allows for a meaningful review of the issues raised—the appellant will not be able to carry its burden of showing prejudicial error by the trial court. (*Ballard*, *supra*, 41 Cal.3d at p. 574.) Here, the application of well-established principles of appellate review to the failure of David's opening brief to summarize the evidence, both favorable and unfavorable to his position, and the failure of his appellant's appendix to include the papers pertinent to Judith's request for attorney fees requires this court to conclude he has failed to carry his burden of demonstrating trial court error. Accordingly, the award of attorney fees will be upheld.

**DISPOSITION**

The judgment is affirmed. Respondent shall recover her costs on appeal.